(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their pruient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the

earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice

of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing

of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license*:

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hear-

ing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary

injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the

application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the

trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sen-

tence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPENDIX B

Oral Opinion of Trial Judge A. R. Stout

THE COURT: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman [sic] case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, "If this doesn't get the money, I don't know Arkansas," and they did quite well. I sustain the City's position, find it okay, and enjoin them. * * *

Temporary Injunction

On this the 17th day of February A. D. 1966, came on to be heard the above entitled and numbered cause wherein the City of Dallas, as Plaintiff, seeks a temporary injunction against the Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, have subjected itself to the jurisdiction of this Court, all parties having been represented by attorneys and in person, and having announced ready for trial, the Court proceeded to examine the pleadings, hear the testimony and the argument of counsel, and after having fully considered the same, together with the viewing

in person of the motion picture "Viva Maria", is of the opinion and hereby finds that the City of Dallas, as Plaintiff, is entitled to a temporary injunction.

It is therefore the ORDER, JUDGMENT and DECREE of this Court, and the Court hereby grants a temporary injunction against Interstate Circuit, Inc., as Defendant, and United Artists Corporation, as Intervenor, enjoining them from exhibiting said motion picture "Viva Maria" in violation of Ordinance No. 11284, or without advertising by media originating within or stationary within the City of Dallas, and exhibiting said film as "not suitable for young persons", and that this temporary injunction shall be effective pending a final hearing for a permanent injunction herein.

The Exceptions of the Defendant and Intervenor in the pleadings are hereby specifically overruled.

The Defendant in open court, requested the Court to file its Findings of Fact and Conclusions of Law and this request is specifically denied.

The Defendant and Intervenor in open court gave notice of appeal *to the Court of Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas.*

Entered this the 18th day of February A. D. 1966.

/s/ A. R. Stout

JUDGE PRESIDING

APPENDIX C

Interstate Circuit, Inc. v. City of Dallas, 402 S.W. 2d 770 (Tex. Civ. App. 1966) error ref., n.r.e.

On February 14, 1966 the City of Dallas, appellee, filed suit against Interstate Circuit, Inc., appellant, an exhibitor of commercial motion pictures, seeking temporary and permanent injunctions restraining said appellant (1) from exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons" and (2) from violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the Ordinance.

On February 16, 1966 United Artists Corporation, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria", intervened in opposition to the City.

On February 18, 1966, following a hearing begun the day before, the court granted the City's prayer for a temporary injunction. The City had offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by appellants.

Ordinance No. 11284 known as the "Motion Picture Classification Ordinance" was passed by the City Council of the City of Dallas on November 22, 1965. It is too long to be copied here in its entirety. A summary of its material provisions will be found in a footnote hereto.*

* The provisions of the ordinance which are material to this controversy may be summarized as follows:
Sec. 46A-1. Definition of Terms:

(d) A young person is defined as being any person who has not attained his sixteenth birthday.

The Ordinance itself has already been the subject of court action. A number of motion picture exhibitors filed suit in the United States District Court for the Northern District of Texas seeking an injunction on the ground that the Ordinance itself is violative of the First and Fourteenth Amendments to the Constitution of the United States. On December 23, 1965 Honorable Sarah T. Hughes, judge of that court, held in effect that, though Section 46A-6 of the Ordinance is unconstitutional, the rest of the Ordinance is not violative of the Constitution. Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19. Appended to the opinion is Appendix A—a reproduction in full of the Ordinance. The above judgment is now pending on appeal before the United States Court of Appeals.

(f) The standards to be applied in determining whether films shall be classified as "not suitable for young persons are:

"(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

"(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

"A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

In the appeal now before us Section 46A-6 is not involved. No violation of that section is alleged. The City has not undertaken to suspend appellants' license and does not seek to do so. Therefore, we shall not pass on the constitutionality of Section 46A-6, which under the terms of Section 46A-11 may be treated as severable from the rest of the Ordinance.

The two appellants have filed separate briefs. Interstate Circuit, Inc., in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the Ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article 1, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with appellants.

Sec. 46A-2. Establishment of Board:

This section provides for the creation of the Dallas Motion Picture Classification Board.

Sec. 46A-3. Classification Procedure:

(a) Before exhibiting a film the exhibitor shall file a proposed classification of the film together with a resume of the plot and other information. If the Board approves the exhibitor's proposed classification it shall file its approval. If the Board fails either to file an approved classification or to hold a hearing within five days, the exhibitor's proposed classification shall be considered approved.

(b) If the Board is not satisfied with the exhibitor's proposed classification, it may request an exhibition of the film before the Board at the earliest time practicable with due regard to the availability of the film. At the screening before the Board the exhibitor may appear, make such statements and present such evidence as he may desire. The Board shall file its classification within two days after such screening.

(c) Any initial or subsequent exhibitor may file an application for a change in classification. If the prior classification should be changed to "not suitable for young persons" the exhibitor shall have seven days in which to alter his advertising and audience policy.

(d) The Board shall notify all exhibitors of its classification order.

Of course Article 1, Sections 8 and 19 of the Constitution of the State of Texas does not override the Constitution of the United States. Therefore, we shall in the main confine our discussion to the latter Constitution and interpretations thereof, especially with reference to civil suits since this suit does not involve a criminal action, as did the case of Malone v. State of Texas, 339 S.W. 2d 666.

This is not a totally suppressive ordinance, or one that would totally deny the exhibition to anyone of the picture "Viva Maria" or any other classified film. It does not in any way prohibit the exhibition of any classified picture to adults. It does not even prohibit the exhibition of the picture to any child under the age of sixteen years if accompanied by parent, guardian, husband or wife. It does not prohibit exhibitors from exhibiting pictures classified "not suitable for young persons". It does not prohibit distributors from distributing a picture so classified. It is in the nature of a classification ordinance, the purpose of which is to regulate the exhibition of classified pictures to children.

By providing for such regulation the Ordinance does not contravene the freedom of speech provisions of our Constitu-

(e) The classification shall be binding on any subsequent exhibitor unless a change in classification is made.

Sec. 46A-4. Offenses:

(a) It shall be unlawful for an exhibitor (1) to exhibit a film which has not been classified; (2) and (3) to exhibit any film classified "not suitable for young persons" under sixteen years of age unless advertising and display media state that the picture is so classified; (4) and (5) knowingly to sell or give to a young person a ticket to a film classified "unsuitable for young persons", or knowingly to permit a young person to view such film.

(d) It shall be a valid defense to any prosecution or other proceeding under the Ordinance that the young person was accompanied by his parent, legal guardian, husband or wife.

tions. The Supreme Court of the United States has itself suggested that such regulation is proper. We quote from the opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material *deemed harmful to children.* But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population. . . *to reading only what is fit for children.*' Butler v. Michigan, 352 U.S. 380, 383 1 L. Ed. 2d 412, 414, 77 S. Ct. 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectional material to children, rather than at totally prohibiting its dissemination." (Emphasis supplied.)

See also Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 88 L. Ed. 645, and People v. Walton, 161 P.2d 498.

Sec. 46A-5. License:

Every exhibitor holding a general motion picture license shall be entitled to issuance of a license to exhibit films classified "not suitable for young persons."

Sec. 46A-6. Revocation or Suspension of License:

Upon complaint being filed that any exhibitor has repeatedly violated the provisions of the Ordinance or has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a classified film, the City Council may after notice and hearing suspend for one year the exhibitor's license for the showing of classified pictures.

Sec. 46A-7. Judicial Review:

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be

Freedom of speech, mighty bulwark that it is in the preservation of our liberties, is not an absolute right—a truth that is recognized by court decisions. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766; and Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. We do not believe that our forefathers in adopting our constitutional provisions or that subsequent interpreters thereof intended to require of children the same discretion, the same mature judgment, or the same responsibility in sex matters that we do of adults. Freedom of speech does not include the right to teach children that sexual promiscuity is to be approved and accepted as a standard of conduct. And to so hold is not merely to embrace a contemporary local community standard as appellants contend. It involves a contemporary national standard.

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required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

Sec. 46A-10. Exception to State Law:

Nothing in Ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of Texas Penal Code.

Sec. 46A-11. *Severability Clause:*

Should any section of the Ordinance be held invalid such holding shall not render invalid any other section, the various sections, etc. being deemed severable for this purpose.

This Ordinance avoids constitutional infirmity though it provides for a prior submission of a film under some circumstances. Times Film Corp. v. Chicago, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391. The process under the terms of the Ordinance takes place under procedural safeguards which require that (1) the burden of proving that the film is not protected rests on the City; (2) the exhibitor is assured by the Ordinance and authoritative judicial construction that within a specified brief period of time the City will ether issue a permit or go to court to obtain a regulated showing of the film; (3) any restraint in advance of final adjudication must be for the shortest period of time compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision. These are the tests laid down by the Supreme Court of the United States in Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 in a *total censorship case.*

The Texas Rules of Civil Procedure grant powers to courts to make prompt judicial decisions. In the district courts Rule 245(c) provides that actions may be placed on the trial calendar "in such other manner as the courts deem expedient" and Rule 330(b), applicable to Dallas courts, provides that "the court may set any case for trial at any time so as to allow the parties reasonable time for preparation."

In the appellate courts Rule 410, after listing certain types of cases which shall have precedence in Courts of Civil Appeals then states in Section (f): "Such other cases

as the court by order or rule, may direct." Rule 497 provides that "Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys."

The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural time table has been inadequate to meet the requirements set out in the Freedman case.

Appellants complain that the Ordinance leaves too much to the judgment and discretion of the Board. Appellants apparently overlook the fact that this case was not tried in the district court under the "substantial evidence rule", which requires a court to approve an administrative agency's decision if there is any substantial evidence to support it. This was a "*de novo*" trial in which the court was free to make and obviously did make its own independent findings regardless of the findings or judgment of the Board.

Appellants say that the Ordinance is invalid because it provides standards for the judgment which are too broad, vague, uncertain and indefinite to permit of enforcement or to give fair notice of the type of films which may be subject to classification. We see no such infirmity in the Ordinance. In Subsection (f) of Section 46A-1 the Ordinance sets definite standards for classification. Absolute precision is not required. What is required and what we think the Ordinance affords is a sufficiently definite warning of the standards

which are to guide the Board and the Courts in classifying films. As was said in Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498 (at page 1510), 77 S. Ct. 1304:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. *This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.* '. . . The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7, 8, 91 L. Ed. 1877, 1883, 67 S. Ct. 1538. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous. . . .'" (Emphasis ours.)

Appellants further say the Ordinance is invalid because it involves a contemporary community standard of a local community only, the City of Dallas, and not the State of Texas or the United States. Again we cannot agree with appellants. To regulate to a limited extent the portrayal to children under the age of sixteen years of sexual promiscuity as acceptable is not to apply merely a local community standard. It is to apply a contemporary national standard.

Appellants contend that to support the validity of the Ordinance or any action taken under its terms the City must prove that a film classified "not suitable for young persons"

must pass three tests. We quote from the brief of the distributor, appellant United Artists Corporation:

> "1. It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and, 2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478 L. Ed. 2d 639 (1962); and, 3. It must be utterly without redeeming value; hence the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

We bow to the pronouncements of the Supreme Court of the United States. But we do not believe that the holdings above set out are applicable here. In all of the cited cases the court was considering enactments which sought to impose total censorship. Their effect would have been to ban completely the sale, distribution or exhibiting of the matter involved either to adults or children. The Ordinance we have before us for consideration in this case does no such thing. As we have already pointed out it does not call for total censorship in any instance. It simply applies limited regulations of the conditions under which certain classified pictures may be exhibited to children under the age of sixteen years.

If we be in error in the above holding we nevertheless hold that the Ordinance and its application in this case do not violate the constitutional provisions. We have read the evidence reproduced in the statement of facts and viewed

the film "Viva Maria." The latter was exhibited for our benefit in the court room. The evidence amply supports the implied findings of the Board and the district court that the film offends in all of the particulars named under the three headings quoted in the foregoing excerpt from appellant's brief.

If the three tests are to be applied in this case we think test No. 1 should be modified so that in place of the words "judged by the average person" there should be substituted the words "judged by the average *young person*"—meaning a person under the age of sixteen years. However, we would make the same holding if test No. 1 were not so modified.

In the case of John Cleland's "Memoirs of a Woman of Pleasure" vs Attorney General of the Commonwealth of Massachusetts decided March 21, 1966, 34 "The United States Law Week" 4236, the Supreme Court of the United States reversed a judgment of a Massachusetts court banning the above named book. The court said, "A book cannot be proscribed unless it is found to be utterly without redeeming social value." But the court then went on to say:

> "It does not necessarily follow from this reversal that a determination that 'Memoirs' is obscene * * * would be improper under all circumstances. On the premise, which we have no occasion to assess, that 'Memoirs' has the requisite prurient appeal and is patently offensive, *but has only a minimum of social value*, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected." (Emphasis supplied.)

We hold that "Viva Maria" has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance which the City seeks to apply or from the terms of the temporary injunction granted by the trial court.

Appellant United Artists Corporation, distributor, asserts that it has the same constitutional rights as the exhibitor, yet it is not mentioned in the Ordinance and was not notified of the hearings. There is no merit to this contention. United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed.

We overrule the first six points on appeal of appellant Interstate Circuit, Inc. and all ten points of appellant United Artists Corporation.

In its seventh point appellant Interstate Circuit says that under Article 527 of the Texas Penal Code the State preempted to regulation of motion pictures, so that a municipality may not enter the field. In its eighth to sixteenth points, inclusive, appellant complains of the action of the court in overruling exceptions to appellee's pleadings. In its seventeenth point appellant objects to the court's failure

to set forth reasons to justify the granting of the temporary injunction. In its eighteenth and nineteenth points appellant alleges that the temporary injunction was not supported by pleadings and the court misapplied the law. We have considered all these additional points and find no merit in them. They are overruled.

Justice Bateman has written a concurring opinion in which he presents his views somewhat in detail. I have read his concurring opinion and agree with his views as stated by him.

The judgment of the trial court is
AFFIRMED.

DIXON, *Chief Justice*

Bateman, Justice (Concurring)

I concur fully with everything written by my Brother Dixon in his opinion and would like to enlarge somewhat on several of the decisions contained therein.

By its seventh point of error on appeal the appellant Interstate Circuit, Inc. says the court erred in refusing to hold that Article 527 of the Texas Penal Code pre-empted the field of regulating motion pictures, thus making invalid such attempted action by the City. The first two sections of Article 527, Penal Code of Texas, as amended in 1961, prohibit the doing of certain things, including the exhibition of obscene motion pictures, but Section 5 provides, in part, as follows:

> "The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

The evidence clearly shows that the film in question is what is known as a "commercial motion picture" and that it has moved, and will probably continue to move in interstate commerce. We think we can safely assume that such movements in interstate commerce will be "legal." Therefore, this motion picture, being one of a class specifically ex-

cepted from the effect of Article 527, is subject to regulation by the City.

Moreover, the City of Dallas, being a home rule city deriving its powers from Article 11, Section 5, of the Texas Constitution, has plenary charter powers which include the power to enact the ordinance here in question, its powers being subject only to the limitation that its charter and ordinances shall contain nothing inconsistent with the Texas and Federal Constitutions or the general laws enacted by the State Legislature. City of Fort Worth v. McDonald, Tex. Civ. App., 293 S.W. 2d 256, wr. ref. n.r.e.; Janus Films, Inc. v. City of Fort Worth, Tex. Civ. App., 354 S.W. 2d 597, wr. ref. n.r.e. *per curiam*, 163 Tex. 616, 358 S.W. 2d 589. Home rule cities have full authority to do anything the Legislature could have authorized them to do prior to adoption of the Home-Rule Amendment, the result being that it is not necessary to look to the acts of the Legislature for grants of power to such cities, but only for limitations on their powers. Forwood v. City of Taylor, 147 Tex. 161, 214 S.W. 2d 282, 286; Yellow Cab Transit Co. v. Tuck, Tex. Civ. App., 115 S.W. 2d 455, wr. ref.

Appellants take the position that in the light of certain pronouncements by the Supreme Court the picture "Viva Maria" is entitled to protection under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the Texas Constitution unless it can

be properly said that it is obscene; and that in determining whether it is obscene three tests must be applied, to wit:

> "1: It must deal with sex in a manner appealing to the prurient interest, judged by the average person, applying contemporary community standards, and considering its dominant theme as a whole. Roth v. United States, 344 U.S. 476, 1 L. Ed. 2d 1498 (1957); and,
>
> "2. It must be patently offensive—so offensive on its face as to affront community standards of decency. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L. Ed. 2d 639 (1962); and,
>
> "3. It must be utterly without redeeming value; hence, the good may not be weighed against the bad. Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793 (1964)."

It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as "not suitable for young persons" is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

The ordinance under examination, in defining the phrase "not suitable for young persons," does not employ the words "obscene" or "obscenity." The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not

consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. Conveying to young persons the idea that to be able to enjoy the pleasures of sexual gratification without being burdened with any accompanying responsibility or commitment, and with no retributive consequences, or even the slightest remorse, is acceptable behavior according to accepted standards of the American community, would in my opinion have a much more pernicious effect on the morals of the community than mere obscenities. To say that a community is powerless to protect its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable.

We are also asked to dissolve the temporary injunction because the order does not contain a recitation of the judge's reasons for issuing the same, as required by Rule 683, T.R.C.P. It is true that this order merely recites that all parties were represented by attorneys and in person, that they announced ready for trial and that the court, after hearing the testimony and argument of counsel, and after having fully considered the same, together with the viewing in person of the motion picture "Viva Maria", is of the opinion and finds that the appellee is entitled to a temporary injunction. The order then proceeds to grant the temporary injunction. It is also true that several Texas cases have held that this

requirement of Rule 683 is mandatory and that the omission of the reasons for granting the injunction is fatal and requires reversal. Miller v. State, Tex. Civ. App., 305 S.W. 2d 663, no wr. hist.; Northcutt v. Waren, Tex. Civ. App., 326 S.W. 2d 10, wr. ref. n.r.e.; City of Houston v. Rose, Tex. Civ. App.., 361 S.W. 2d 477, no wr. hist.

In Miller v. State, *supra*, the temporary injunction had been granted without notice to the defendant and without a hearing. There was neither pleading nor evidence that irreparable wrong, damage or injury was imminently threatened. The order did not state the reasons for its issuance. For all these reasons the order was reversed and remanded.

In Northcutt v. Waren, *supra*, there were also additional substantial grounds for reversal.

In City of Houston v. Rose, *supra*, although the failure to state the reasons for the injunction seems to have been the only ground on which the order was reversed, it was pointed out in the opinion that in several cases it had been held that the failure to set forth the reasons for granting a temporary injunction would not require a reversal "where the record affirmatively shows that no harm resulted."

It seems to be well settled by the following authorities that Rule 683 does not require a reversal when the record "affirmatively shows that no harm resulted." 31 Tex. Jur. 2d, INJUNCTIONS, § 157, p. 274; O'Daniel v. Libal, Tex. Civ.

App., 196 S.W. 2d 211, no wr. hist.; Gonzalez v. Rodriguez, Tex. Civ. App., 250 S.W. 2d 253, no wr. hist.; Rothermel v. Goodrich, Tex. Civ. App., 292 S.W. 2d 882, 884; Payton v. Hurst, etc. Clinic, Tex. Civ. App., 318 S.W. 2d 726, wr. ref. n.r.e. See also Transport Co. of Texas v. Robertson Transports, Inc., 152 Tex. 551, 261 S.W. 2d 549, and Garcia v. Sun Oil Co., Tex. Civ. App., 300 S.W. 2d 724, 735, wr. ref. n.r.e.

As pointed out in O'Daniel v. Libal, *supra*, "The purpose of the rule above referred to is to inform a party just what he is enjoined from doing and the reasons why he is so enjoined." It was also pointed out in that opinion that the application for temporary injunction was set down for hearing and that the appellant filed his answer, that both parties introduced several witnesses, some twenty witnesses testifying at the hearing, and that "the main and sole inquiry" was whether or not the act sought to be enjoined had or would result in a nuisance; that the appellant was familiar with the prayer of appellee's petition, had heard the statement of the court when he pronounced the judgment and that there could be "no doubt but what appellant knew what he was enjoined from doing and the reasons why."

With slight exception, the same may be said of the case at bar. Without further lengthening this opinion by reciting the evidence and the statements of the trial judge at the time he announced his decision in the presence of counsel

for all parties, I would simply state that this record does affirmatively show that no harm resulted from the failure of the judge to recite specifically in his order the reasons why he granted the temporary injunction. Certainly, it will not be argued that such omission probably caused the rendition of an improper judgment or probably prevented appellants from making a proper presentation of the case to this court. Rule 434, T.R.C.P.

Appellants and appellee are each asserting substantive rights under Federal law. Appellants say the film in question is protected under the United States Constitution, while appellee asserts that the exercise of its substantive right to regulate the exhibition of the film is within the bounds of that same Constitution. Yet, we are asked to reverse this case on a purely technical, procedural rule. This we are in effect prohibited from doing by the Supreme Court of the United States in Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889, wherein the court said that "* * * the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Rule 683, T.R.C.P., under discussion here, is purely procedural and does not involve any substantive rights of the parties. It cannot be invoked to deny the parties, appellants and appellee, of their rights under the Constitution of the United States. For this additional reason the point is overruled.

I am fully persuaded that the temporary injunction was properly granted and that it is our duty to affirm.

BATEMAN, *Associate Justice*

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT DALLAS

INTERSTATE CIRCUIT, INC,. et al.,

v.

CITY OF DALLAS

From District Court of Dallas County

Tuesday, April 5, 1966

Opinion of the Court Delivered by Mr. Dixon, Chief Justice

Mr. Williams, Associate Justice, not sitting.

Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee, City of Dallas, have and recover of and from the appellants, Interstate Circuit, Incorporated, and United Artists Corporation, and from the cash deposit in the hands of the District Clerk of Dallas County, Texas, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

Concurring opinion delivered by Mr. Bateman,

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INTERSTATE CIRCUIT, INC., et al.,

v.

CITY OF DALLAS

Monday, April 25, 1966

This day came on to be heard the motion of appellant United Artists Corporation for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

APPENDIX D

July 27, 1966

SUPREME COURT OF TEXAS

No. A-11,490

INTERSTATE CIRCUIT, INC., et al.,

v.

CITY OF DALLAS

From Dallas County, Fifth District.

Application of Interstate Circuit, Inc. and application of United Artists Corporation for writs of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, Interstate Circuit, Inc., and United Artists Corporation pay all costs incurred on their respective applications.

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October 19, 1966

No. A-11,490

INTERSTATE CIRCUIT, INC,. et al.,

v.

CITY OF DALLAS

From Dallas County, Fifth District.

Motions of petitioners for rehearing of their applications for writs of error having been duly considered, it is ordered that said motions be, and hereby are, overruled.